In the

United States Court of Appeals

For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*

v.

STEWART L. UDALL, Secretary of the Interior, *et al.*, *Appellees*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE APPELLANT

JOHN J. O'CONNELL,
Attorney General,

HAROLD T. HARTINGER,
J. R. PRITCHARD,
Assistant Attorneys General,

Attorneys for Appellant.

Temple of Justice, Olympia, Washington 98501
Telephone 753-5318, Area Code 206

STATE PRINTING PLANT, OLYMPIA, WASH.

In the

United States

Court of Appeals

For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*

v.

STEWART L. UDALL, Secretary of the Interior, *et al.*, *Appellees*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE APPELLANT

JOHN J. O'CONNELL,
Attorney General,

HAROLD T. HARTINGER,
J. R. PRITCHARD,
Assistant Attorneys General,

Attorneys for Appellant.

Temple of Justice, Olympia, Washington 98501
Telephone 753-5318, Area Code 206

INDEX

CITATIONS

Cases:

CITATIONS—Continued

Cases: *Page*

CITATIONS—Continued

CONSTITUTIONS AND STATUTES

CONSTITUTIONS AND STATUTES—Continued

MISCELLANEOUS

In the

United States Court of Appeals

For the Ninth Circuit

No. 22413

STATE OF WASHINGTON, *Appellant*

v.

STEWART L. UDALL, Secretary of the Interior, *et al.*,[1] *Appellees*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court filed no formal opinion. The Court did render an oral decision on May 19, 1967, which was made a part of its July 7, 1967, Order of

[1]The additional appellees, who with the Secretary were defendants below, are Floyd E. Dominy, *Commissioner, U. S. Bureau of Reclamation*; H. T. Nelson, *Regional Director, U. S. Bureau of Reclamation*; W. E. Rawlings, *Columbia Basin Project Manager, U. S. Bureau of Reclamation*; the United States; and the South Columbia Basin Irrigation District, *a public corporation of the State of Washington.* (R. 2-3.)

Dismissal and Final Judgment (R. 149-58) which is set out as Appendix A, *infra*, pp. 36-41 (with formal parts omitted).

JURISDICTION

This is an appeal from a final judgment (R. 150-58) entered July 7, 1967, pursuant to Fed. R. Civ. P. 54(b) by the U. S. District Court, District of Washington, Northern Division, dismissing the State of Washington's complaint against the defendant United States and its officers. This Court has jurisdiction under 28 U.S.C. § 1291.

The state's claims arise under the Columbia Basin Project Act of October 1, 1962, Public Law 87-728, 76 Stat. 677, set out as Appendix B, *infra*, pp. 42-46, and § 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 629, as amended, 70 Stat. 524 (43 U.S.C. § 423e), set out as Appendix C, *infra*, pp. 47-49.

By its complaint (R. 1-33) the state sought a declaratory judgment, injunctive relief, and relief in the nature of mandamus in the District Court under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706;[2] 28 U.S.C. § 1361, which authorizes relief in the nature of mandamus against officers of the government; the Declaratory Judgment Act, 28 U.S.C. § 2201; and 28 U.S.C. § 1331, the "federal question" statute.[3] The state also sought a judgment

[2]Formerly codified as 5 U.S.C. § 1009.

[3]As to its claim for non-monetary relief, the state alleged that the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs (R. 2).

for damages against the United States under the Tucker Act, 28 U.S.C. § 1346.[4]

The defendant United States and its officers, by motion to dismiss (R. 35-36), challenged the District Court's jurisdiction over the state's claim. After hearing, the Court below announced its oral decision (R. 152-58, see *infra*, pp. 39-41. The State filed a petition for rehearing, reconsideration, and alternate relief (R. 132-44). On July 7, 1967, the Court entered an order denying the petition (R. 148) and an order and final judgment[5] dismissing the complaint as to the United States and its officers (R. 149-58). The state's notice of appeal (R. 159-60) was filed August 30, 1967.

Statement of the Case

Introduction

The State of Washington is owner of Farm Units 34 and 35, Irrigation Block 23, Columbia Basin Project, Washington. These lands lie within the South Columbia Irrigation District[6] and have

---

[4]Damages claimed under the Tucker Act do not exceed $10,000 (R. 2); by its memorandum of May 5, 1967, the state expressly waived all claims for damages in excess of the District Court's jurisdictional limits (R. 119-20). This was done to preserve the Court's jurisdiction within the rule announced in *United States v. Johnson*, 153 F.2d 846 (9th Cir. 1946).

[5]The Court, pursuant to Fed. R. Civ. P. 54(b), determined that there was no just reason for delay and directed entry of final jugment as to all defendants other than the South Columbia Basin Irrigation District.

[6]The South Columbia Basin Irrigation District is one of the three irrigation districts within the Columbia Basin

been assessed by the district. In July of 1966, after paying all current assessments against Farm Units 34 and 35, the state made demand for the delivery of irrigation water to all irrigable acreage within each tract. The demand was referred by the district to W. E. Rawlings, Columbia Basin Project Manager, U. S. Bureau of Reclamation. (R. 3-4, 13-14).

By letter of August 5, 1966, the project manager ruled that inasmuch as Farm Units 34 and 35 contained land in excess of 160 irrigable acres,[7] water from the Columbia Basin Project would not be delivered to more than 160 acres of irrigable land unless, as to those lands in excess of 160 acres, the state would execute a recordable contract proposed by the U. S. Bureau of Reclamation. Under the terms of this recordable contract irrigation water would be made available to all of Farm Units 34 and 35, provided that the state agreed (R. 26-32):

1. To authorize a binding appraisal by the Secretary of Interior of all irrigable lands in excess of 160 acres within the units;

2. To offer for sale, within five years and at the Secretary's appraised price, such irrigable lands in excess of 160 acres; and

3. To constitute the Secretary of Interior its

Project. It is organized under state irrigation law and has entered into the repayment contract with the United States authorized by Public Law 87-728 (App. B, *infra*, pp. 42-46). See S. Rep. 2002, 87th Cong., 2d Sess. (1962), and *In re South Columbia Basin Irrigation Dist.*, 63 Wn.2d 115, 385 P.2d 715 (1963).

[7]Farm Unit 34 contains 131.5 irrigable acres; Farm Unit 35 contains 120.8 irrigable acres (R. 14).

agent with the non-revocable and exclusive right to sell such irrigable lands in excess of 160 acres that remain unsold by the state from and after October 1, 1972.

The state refused to execute the recordable contract proposed by the Columbia Basin Project manager. Its refusal was based upon the fact that the covenants demanded of the state under the proposed contract violated the provisions of the state constitution and Enabling Act. (R. 78.) Title to Farm Units 34 and 35 vested in the state at the time of statehood pursuant to the common school land grant made by Congress under section 10 of the state Enabling Act, ch. 180, 26 Stat. 676 (1889). Consequently disposal of such lands by the state is restricted by section 11[8] of the Enabling Act and by article 16, sections 1 and 2, of the Washington Constitution. (R. 3-5, 7-8.)

The pertinent provision of Enabling Act § 11 (as it now reads and has read since the amendment of May 7, 1932, 47 Stat. 150) reads as follows:

> That all lands granted by this [Enabling] Act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5 per acre. . . .

The pertinent provisions of article 16 of the Wash-

[8]Section 11 has been amended by Congress on numerous occasions: 42 Stat. 158 (1921); 47 Stat. 150 (1932); 52 Stat. 1198 (1938); 62 Stat. 170 (1948); 66 Stat. 283 (1952); 76 Stat. 91 (1962); ——Stat. ——(Public Law 90-41, June 30, 1967).

ington Constitution relating to school and granted lands are these:

> § 1 *Disposition Of.* All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.
>
> § 2 *Manner and Terms of Sale.* None of such lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder, the value thereof, less the improvements shall, before any sale, be appraised by a board of appraisers to be provided by law, the terms of payments also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of the said land. . . .

Wrongful Refusal to Deliver Water

By its complaint the state alleged that refusal of the officers of the United States to deliver water to all irrigable lands within Farm Units 34 and 35 was without lawful justification, constituted arbitrary and capricious action, and violated a plain legal duty. The state specifically averred that its school lands were exempt from the 160 acre ("excess land") limitations of the Federal Reclamation Act

of June 17, 1902 (32 Stat. 388), as amended and supplemented. (R. 8.) Specifically, the state contended[9] that the Columbia Basin Project Manager had erroneously applied the "excess land" or 160 acre limitation of 43 U.S.C. § 423e (App. C, *infra*, pp. 47-49) to granted school lands.

The plain reading of the applicable portion of § 423e supports the state's contention. The pertinent language reads:

> . . . Such contract or contracts with irrigation districts . . . [for the repayment of the cost of constructing, operating, and maintaining federal irrigation works] shall further provide that all irrigable land *held in private ownership* by any one owner in excess of one hundred sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sales prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; . . . [Emphasis ours.]

Furthermore, the history of congressional legislation concerning the Columbia Basin Project negates any congressional intent to impliedly authorize the Secretary of the Interior to administratively extend the excess land restrictions of private ownership to

[9]State's memorandum of March 30, 1967 (R. 67-73).

lands Congress had granted to the state for the support of common schools.

The matter can be best explained by reviewing the legislation governing the Columbia Basin Project as it existed prior to October 1, 1962, and enactment of Public Law 87-728 (App. B, *infra*, pp. 42-46) and as it existed after enactment of Public Law 87-728.

The Columbia Basin Project Act

Prior to enactment of Public Law 87-728 the Columbia Basin Project was different from all other federal reclamation projects. See 16 U.S.C.A. §§ 835-835i (1960 ed.); S. Rep. No. 2002, 87th Cong., 2d Sess. (1962). Three important innovations in federal reclamation law that were not found elsewhere in other reclamation projects were these: (1) platting of *all* lands within the project in farm units; (2) providing for recordable contracts for non-excess lands as well as excess lands; and (3) requiring state participation as a prerequisite to delivery of any project water.

Farm Units. The Congress directed that the Secretary of the Interior should plat all lands within the Columbia Basin Project into farm units of sufficient size, locaton, soil, and topography to support an average-size family. 16 U.S.C.A. § 835a(b)(ii).[10] This first innovation in federal reclamation law was truly remarkable because the direction of Congress called for a platting of private

[10]Repealed by Public Law 87-728, § 3.

lands and state lands in addition to the platting of lands which the government itself owned.

Recordable Contracts. The second innovation under the Columbia Basin Project Act concerned the terms that were to be included in recordable contracts. The act required that every landowner, as a condition for the delivery of project water to any of his lands (non-excess as well as excess) must sign a recordable contract containing, in addition to the usual terms, an agreement on his part to conform his land by purchase, sale, or exchange to the established farm units platted by the Secretary of the Interior. 16 U.S.C.A. § 835a(c).[11] Of course if lands were to be purchased or sold the Secretary of the Interior's appraisal limited the price.

State Participation. The third innovation of the pre-1962 Columbia Basin Project Act was a limitation restricting the delivery of project water to private lands until the state had agreed to subject its lands to the foregoing farm unit and recordable contract provisions. 16 U.S.C.A. § 835c-3.[12] Of course this innovation called for a modification of the public sale, minimum price, and appraisal requirements of both the Enabling Act § 11 and the state constitution, art. 16, §§ 1 and 2, quoted *supra*, pp. 5 and 6.

Congress expressly waived application of the Enabling Act provisions, 16 U.S.C.A. § 835c-5[13] but modification of the state constitution proved to be

[11]Repealed by Public Law 87-728, § 3.

[12]Repealed by Public Law 87-728, § 3.

[13]Repealed by Public Law 87-728, § 3.

another matter. By 1950 Congress recognized that the necessary amendment to the state constitution would not be forthcoming, and instead, Congress amended the project act to grant state school and granted lands a partial exemption from the statutory recordable contract provisions. S. Rep. 2498, 81st Cong., 2d Sess. (1950).[14]

The partial exemption of state lands from the original provisions of the Columbia Basin Project Act was granted by a measure entitled "An Act to amend the Columbia Basin Project Act with reference to State lands,"[15] set out as Appendix D, *infra*, pp. 50-51. Under this 1950 act the purchaser of state school and granted lands would not be disqualified from executing a recordable contract by reason of the amount of the purchase price paid the state where the state sale was made pursuant to a program agreed to by the Secretary of Interior and the state. By this device the public sale and appraisal procedures required by the Washington Constitution would be complied with. S. Rep. No. 2498, 81st Cong., 2d Sess. (1950).

The 1950 act was fully implemented in 1951 by the execution of a formal "Agreement Relating to Disposal of State Lands in the Columbia Basin Project, Washington."[16] The Acting Regional Director of

[14]1950 *U.S. Code & Cong. Serv.* 3955.

[15]Public Law 851, 81st Cong., 2d Sess., 64 Stat. 1074 (1950).

[16]The agreement is set forth in full as an exhibit to the complaint (R. 17-25) and, except for omitted acknowledgments and an annexed form of recordable contract to be executed by a purchaser of state lands, is also set out in full as Exhibit E, *infra*, pp. 52-56.

the Bureau of Reclamation executed the agreement for the Secretary of Interior; the Commissioner of Public Lands executed it for the state. From 1951 to enactment of Public Law 87-728[17] on October 1, 1962, the United States and the state acted upon this contract. Since October 1, 1962, the Secretary of Interior and his subordinate officers in the Bureau of Reclamation have declined to act under the 1951 contract or to acknowledge its continued validity. (R. 6.)

The Columbia Basin Project Act and Public Law 87-728

The broad purpose of Public Law 87-728 was to do away with the special innovations of the original Columbia Basin Project Act which we have summarized above and to provide that henceforth the project would be governed by the general Federal Reclamation Act of June 17, 1902, as amended. In addition Public Law 87-728 repealed the statutory basis for the Secretary of Interior's 1951 agreement with the state for the disposal of state lands.[18] By reading this repeal against the backdrop of broad congressional purpose, the Secretary of Interior finds an intent on the part of Congress to terminate all rights of the state under its 1951 agreement with the United States.

However, assuming the Secretary correctly in-

---

[17]See Appendix B, *infra*, pp. 42-46.

[18]Public Law 87-728, § 3; 16 U.S.C.A. § 835-1 (Supp. 1966). See S. Rep. 2002, 87th Cong., 2d Sess. (1962).

terprets the will of Congress, it then becomes clear that Congress intended to deny the Secretary the right to classify school lands as "land held in private ownership" and thus subject to the excess land restrictions of 43 U.S.C. § 423e (see, *supra*, p. 7). These considerations compel this conclusion:

1. School lands were granted to the State of Washington because Congress acted upon a long standing policy of generous support for public education. Orfield, *Federal Land Grants to the States* 36-52 (1915); Hibbard, *A History of the Public Land Policies* 305-319 (1924); *cf. Johanson v. Washington*, 190 U.S. 179 (1903). State school lands are therefore lands dedicated to a special public purpose, *Soundview Pulp Co. v. Taylor*, 21 Wn.2d 261, 150 P.2d 839 (1944), and remain lands subject to a federal interest until such time as the trust imposed by Congress is extinguished in accordance with federal law. See *Lassen v. Arizona Highway Dep't*, 385 U.S. 458 (1967). As such, state school lands have not been deemed subject to the general excess land restrictions of 43 U.S.C. § 423e in other federal projects within the State of Washington, and would appear to fall within the general exemption for public purposes that the Secretary of Interior has recognized in other states where publicly owned lands have been included in federal reclamation projects, *Acreage Limitation Policy—A Study Prepared by the Department of Interior* 21, 88th Cong., 2d Sess. (Comm. Print 1964).

2. Congress itself appears in the past to have assumed that the acreage limitations applicable to state lands under the original Columbia Basin Project Act were a special departure from the acreage limitations of the general federal reclamation laws. In 1959, when Congress granted a special exemption under the original act to permit the operation of the Washington State University experimental farm, Public Law 86-52, 73 Stat. 87 (1959), the report of the House Committee on Interior and Insular Affairs supported the measure, saying:[19]

> Under the Columbia Basin Project Act, *unlike the general Federal reclamation laws*, the limitation on the acreage to which water may lawfully be delivered is applicable to State-owned lands as well as private land. In the absence of such legislation as H.R. 1306, water could therefore be delivered to no more than 160 acres of State-owned land. [Emphasis ours.]

4. Denial of water to "excess lands" presently in state ownership within the Columbia Basin Project, in addition to termination of vested rights of the state under its 1951 contract with the government, would require provision for just compensation to the state. The failure of Congress to make such provisions suggests that Congress expected that state school lands would receive irrigation water so that no payment for lost contract rights would be necessary.

5. Denial of water to "excess lands" presently in

---

[19] *Amending Section 2(b) of the Columbia Basin Project Act*, 1-2, H. Rep. 176, 86th Cong., 1st Sess. (1959).

state ownership, in addition to termination of state rights under its 1951 contract with the government, would be tantamount to exclusion of the state lands from the state organized irrigation districts within the Columbia Basin Project. Under Wash. Rev. Code § 87.03.240 assessments may be levied by state irrigation districts only on the basis of special benefits. If the state school lands are not presently eligible to receive water and cannot be made eligible, no showing of special benefits is possible and no assessments can be levied against the lands.[20] *Cf. Northern Pacific Ry. v. Walla Walla County*, 116 Wash. 684, 200 Pac. 585 (1921).

Relief Sought by the State in District Court

The state sought alternate relief under its complaint filed in the District Court. First, the state sought a judicial determination that all its irrigable lands in Farm Units 34 and 35, following enactment of Public Law 87-728, are eligible to receive Columbia Basin Project water without the acreage limitation under 43 U.S.C. § 423e that applies to "land

[20]In oral argument before the District Court, counsel for the South Columbia Irrigation District advised the Court that the Secretary of Interior presently requires the district to make payments to the government under the districts' repayment contract without deductions that would be appropriate if the Secretary deemed the state lands excluded from the Columbia Basin Project by Public Law 87-728. Since the state has paid no assessments on lands other than Farm Units 34 and 35, the private land owners in the district bear the additional burden of paying these costs until the time the school land problem is resolved.

held in private ownership." (R. 9-10, 67-68.)[21] For this purpose the state alleged that the District Court had jurisdiction to grant a declaratory judgment, injunctive relief, relief in the nature of mandamus, and damages (whichever might be appropriate) under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706; 28 U.S.C. § 1361, authorizing relief in the nature of mandamus against officers of the government; the Declaratory Judgment Act, 28 U.S.C. § 2201; 28 U.S.C. § 1331, the "federal question" statute; and the Tucker Act, 28 U.S.C. § 1346(a)(2).[22] (R. 2, 9-10.)

Second, if judicial vindication of the state's claim to water cannot be achieved (by reason of an adverse decision on the merits or because of want of jurisdiction in the District Court to make a decision on the merits), the state sought alternate relief against the South Columbia Basin Irrigation District, i.e., cancellation of existing assessments, an injunction against future assessments, and a return of assessments already paid on "excess lands." (R. 11-12, 68-69.) However, the matter of alternate relief against the South Columbia Basin Irrigation District is still pending before the District Court[23] and is not ripe for review on this appeal.

---

[21]The state's prayer for a declaratory judgment, binding on all parties, declaring the rights, status, and other legal relations of the parties under the 1951 contract between the United States and the state was abandoned in the District Court and thus is not urged in this Court.

[22]See, *supra*, p. 3 n.4.

[23]Pursuant to Fed. R. Civ. P. 54(b) the District Court entered final judgment dismissing the state's complaint against the United States and its officers, but not against the South Columbia Basin Irrigation District (R. 148-58).

Action by the District Court

The District Court, although impressed with the importance of a need for resolution of the issue, made no ruling on the merits of the state's claim. Instead, the Court sustained the challenge to its jurisdiction made by the United States and its officers through a motion to dismiss the state's complaint as to them. (R. 148-58; see, *infra*, App. A, pp. 36-41.)

The Court ruled (1) that the sovereign immunity doctrine of *Dugan v. Rank*, 372 U.S. 643 (1963), barred relief under all but the Tucker Act claim; (2) that the Tucker Act claim was in excess of the District Court's statutory jurisdiction because the state's claim for damages to Farm Unit 35 could not be severed from its claims to damages to other state-owned tracts within the South Columbia Basin Irrigation District.[24]

---

[24]The District Court in its oral opinion suggested that the state may not have exhausted its administrative remedies before commencing suit (R. 154; App. A, *infra*, p. 40). However, the Court immediately indicated that exhaustion probably would be fruitless in the present case, *ibid.* Thereafter the matter was directly raised and argued by the state under its petition for rehearing and reconsideration (R. 132-36), but neither the order denying the petition (R. 148) nor the formal judgment of dismissal makes further mention of the matter.

Specification of Errors

The District Court erred in dismissing the state's complaint against the defendant United States and its officers because:

1. The District Court is vested with jurisdiction under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706, to review an administrative determination by the Secretary of Interior and his subordinate officers that state school lands (Farm Units 34 and 35) are subject to the acreage limitations of 43 U.S.C. § 423e.

2. The District Court is vested with jurisdiction under 28 U.S.C. § 1361 (the mandamus statute) to compel officers of the United States to perform a duty owed the state, i.e., to compel delivery of water to all irrigable acreage in Farm Units 34 and 35.

3. A claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), for damages to Farm Unit 35 is an independent cause of action without regard to the fact that the state may have additional claims for damages to different and separate parcels of land within the South Columbia Basin Irrigation District and the Columbia Basin Project.

Summary of Argument

1. An administrative determination of the defendant officers of the United States is reviewable by action in the District Court under the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706, because "the Act makes a clear waiver of sovereign immunity in actions to which it applies." *Estrada v. Ahrens*, 296 F.2d 698 (5th Cir. 1961); *cf. Adams v. Witmer*, 271 F.2d 29, 34-35 (9th Cir. 1958), and the "generous review provisions" must be given a "hospitable" reception, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

In this circuit it is well established by *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), and prior cases, that the Administrative Procedure Act grants to District Courts jurisdiction to review administrative decisions adverse to a private party even where the government or its property may have been affected by the decision.

Argument about the scope of the Administrative Procedure Act appears *infra*, pp. 20-27.

2. The 1962 "mandamus" statute, 28 U.S.C. § 1361, authorizes district court orders requiring affirmative action by government officers. Since such a statute was undoubtedly intended to confer an effective jurisdiction, it therefore contains an implied consent to suit so far as such consent is necessary in order for a District Court to exercise its jurisdiction to compel action by an officer of the government. Furthermore, the federal courts are giving the new

mandamus statute a liberal construction, particularly as to the scope of matters reviewable under it. *E.g.*, *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966); *Medoff v. Freeman*, 246 F. Supp. 125 (D. Mass. 1965), *aff'd*, 362 F.2d 472 (1st Cir. 1966); *Ashe v. McNamara*, 335 F. 2d 277 (1st Cir. 1965).

Argument about the scope of the mandamus statute appears *infra* pp. 27-29.

3. There has been no splitting of the state's action for damages under the Tucker Act, 28 U.S.C. § 1346(a)(2). The state here seeks damages to Farm Unit 35. It has no present cause of action for any of its twelve other parcels of land within the South Columbia Basin Irrigation District (or other lands within the Columbia Basin Project) because payment of assessments, a condition precedent to delivery of water, has not been made. But even if the state presently had a right to seek damages for nondelivery of water to these other lands, its right would constitute a separate and different cause of action because the lands are separate and different. *Mendez v. Bowie*, 118 F.2d 435 (1st Cir.), *cert. denied*, 314 U.S. 639 (1941); *Roberts v. Northern Pac. R.R.*, 158 U.S. 1 (1895); *Ross v. Miller*, 252 U.S. 697 (4th Cir. 1918); *United States v. Pan-American Petroleum Co.*, 55 F.2d 753 (9th Cir.), *cert. denied*, 287 U.S. 612 (1932); *Fessenden v. Barrett*, 50 Fed. 690 (D.N.H. 1891).

Argument concerning this issue appears *infra*, pp. 30-35.

Argument

Jurisdiction Under the Administrative Procedure Act

The District Court has jurisdiction to review the administrative determination by the Secretary of Interior and his subordinate officers that state school lands (Farm Units 34 and 35) are subject to the acreage limitations of 43 U.S.C. § 423e because the Administrative Procedure Act § 10 grants such jurisdiction. The pertinent provisions as presently codified are as follows:

> [5 U.S.C. § 702. *Right of review*] A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.
>
> [5 U.S.C. § 703. *Form and venue of proceeding*] The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. . . .
>
> [5 U.S.C. § 704. *Actions reviewable*] Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .
>
> [5 U.S.C. § 706. *Scope of review*] To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action. . . .

The doctrine of sovereign immunity has no application to suits commenced in accordance with the Administrative Procedure Act because "the Act makes a clear waiver of sovereign immunity in actions to which it applies." *Estrada v. Ahrens*, 296 F.2d 698 (5th Cir. 1961).[25] Thus the APA is to be read literally as an independent grant of jurisdiction in those cases where no other statute grants a right of judicial review.[26] As the Supreme Court pointed out earlier this year, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967):

> . . . The Administrative Procedure Act provides specifically not only for review of 'Agency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704. The legislative material elucidating that seminal act [see *Administrative Procedure Act—Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946)] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this

---

[25] *Cf. Blackmar v. Guerre*, 342 U.S. 512, 516 (1951); Hart & Wechsler, *The Federal Courts and the Federal System* 1147 (1953).

[26] *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959), cited with approval in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 n.7 (1963).

In *Foster v. Seaton* an administrative decision to deny a patent to mining claims on federal lands was reviewed in District Court under the Administrative Procedure Act. Prior to adoption of the act, a person wrongfully denied a patent to public land had an action for damages under the Tucker Act, but no other remedy. *United States v. Jones*, 131 U.S. 1 (1889).

> Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. . . . Again in *Rusk v. Cort*, *supra*, [369 U.S. 367] at 379-380, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See also Jaffe, Judicial Control of Administrative Action 336-359 (1965).

The foregoing principles are fully accepted in this circuit.[27] See *Adams v. Witmer*, 271 F.2d 29, 34-35, *rehearing denied*, 291 F. 2d 38 (9th Cir. 1959); *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963); *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966); *Stewart v. Penny*, 238 F. Supp. 821 (D. Nev. 1965); *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965); and *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966).[28]

In *Adams v. Witmer*, 271 F.2d 29, *rehearing denied*, 291 F.2d 38 (9th Cir. 1959), this Court reviewed an administrative order of the Bureau of Land Management denying applications for patents

---

[27]From other circuits, see, *e.g.*, *Freeman v. Brown*, 342 F.2d 205 (5th Cir. 1965); *Amarillo-Borger Express v. United States*, 138 F. Supp. 411 (N.D. Tex. 1956) (three-judge court); *Northern States Power Co. v. Rural Electrification Administration*, 248 F. Supp. 616 (D. Minn. 1965); *Rechany v. Roland*, 235 F. Supp. 79 (S.D. N.Y. 1964).

[28]Petition for certiorari was filed September 18, 1967 (No. 630). 36 Law Week 3193 (Nov. 7, 1967). From the note in *Law Week* setting forth the questions presented, it appears that the government does not seek to reverse this Court's holding that the Administrative Procedure Act § 10, 28 U.S.C. §§ 701-706, vests the courts with jurisdiction to review administrative determinations of private rights in public lands set aside as national forests.

to mining claims. Review was granted under the Administrative Procedure Act § 10 because this Court held that section 10 was a grant of consent to sue the government by complaint filed in the District Court.

In *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963), the same mining claims that were before the Court in the first *Adams* suit were back before the Court, but in different litigation. After this Court's opinion in the first case, the government abandoned its administrative proceedings and filed suit in District Court to determine the validity of the claims. Adams filed a counter-claim seeking the broad review authorized by the Administrative Procedure Act. Again, over the government's objection, this Court ruled that the Administrative Procedure Act constituted a grant of jurisdiction to the District Court which was properly invoked by the defendants counter-claim in a suit initiated by the government.

In *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966), the District Court dismissed a suit by resident physicians at the Long Beach Veterans Hospital challenging regulations of the hospital. Dismissal was granted on the ground that the suit was an unconsented action against the United States and therefore barred by the doctrine of sovereign immunity. This Court reversed, holding that jurisdiction was conferred on the District Court under the Administrative Procedure Act § 10.

In *Stewart v. Penny*, 238 F. Supp. 821 (D.

Nev. (1965), the District Court reviewed and reversed an administrative decision by the Bureau of Land Management to deny a homesteader a patent to public lands. The Court found jurisdiction to do so under the Administrative Procedure Act[29] despite the fact that the contest over issuance of the patent was initiated by the government.[30]

In *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965), the District Court ruled that it had jurisdiction under the Administrative Procedure Act to review the final decision of the Solicitor, Department of the Interior, denying patents on sixteen manganese mining claims.[31]

In *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966), this Court reaffirmed its prior construction of the Administrative Procedure Act in *Adams v. Witmer* and *Adams v. United States*. The Court held that a holder of mining claims in a national forest, by counter-claim in the government's ejectment suit, could invoke the District Court's jurisdiction under the Administrative Procedure Act

---

[29]Prior to adoption of the act, a person wrongfully denied a patent to public land had an action for damages under the Tucker Act, but no other remedy. *United States v. Jones*, 131 U.S. 1 (1889).

[30]District Courts, of course, are vested with jurisdiction under the Administrative Procedure Act to review administrative decisions in contests over public lands initiated by a private citizen against a homestead entryman. *Unruh v. Udall*, 269 F. Supp. 97 (D. Nev. 1967).

[31]This Court expressly approved the holding of *Denison* in *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966).

to review an administrative determination that the claims were invalid.[32]

The *Coleman* ruling is a particularly important decision. After this Court granted the government's petition for rehearing, the government made a determined effort to persuade the Court to reverse its construction of the Administrative Procedure Act. The government's jurisdictional contentions were stated in its *Supplemental and Replacement Brief* as follows:

1. The *Coleman* decision erroneously held that the Administrative Procedure Act authorized an award of specific relief against the United States. *Id.* at 10 and 17-20.

2. The *Coleman* decision erroneously held that the Administrative Procedure Act granted jurisdiction over cabinet officers. *Id.* at 10 and 21-22.

3. The *Coleman* decision erroneously held that public land disposal matters are reviewable under the Administrative Procedure Act. *Id.* at 12 and 40-42.

4. *Mulry v. Driver*, 366 F.2d 544 (9th Cir. 1966), erroneously held that the Administrative Procedure Act constituted a consent to sue the United States. *Id.* at 19 n.5.

---

[32]The United States filed a petition for writ of certiorari with the United States Supreme Court on September 18, 1967. 36 Law Week 3193 (Nov. 7, 1967). See, *supra*, p. 22 n.28. As we there pointed out the petition apparently does not seek review of this Court's ruling that the Administrative Procedure Act granted jurisdiction to the District Court to review the administrative determination.

5. *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958), was wrong to hold that the Administrative Procedure Act conferred jurisdiction on District Courts. *Id.* at 25.

Despite the strong urging from the government, and after oral argument, this Court denied the petition for rehearing. Under these circumstances, which were called to the attention of the District Court,[33] there can be no question but that the District Court was authorized and required by the Administrative Procedure Act to hear and decide the state's claim for review of the administrative determination to apply 43 U.S.C. § 423e to state school lands. It is hornbook law that a District Court must follow the decisions of its own Court of Appeals. 1B Moore, *Federal Practice* ¶ 0.402[1], citing *United States v. Washington Water Power Co.*, 41 F. Supp. 119 (E.D. Wash. 1941), *cert. denied*, 320 U.S. 747 (1943), and similar case authority.

It should be noted that this Court's construction of the grant of jurisdiction to District Courts by the Administrative Procedure Act, following the filing of the *Coleman* opinion, has become the settled law in the Tenth Circuit. Four months before the *Coleman* opinion was filed the District Court for the District of Columbia had exercised jurisdiction under section 10 to review the Secretary of Interior's construction of an "oil and gas" reservation in favor of the government under a United States pa-

[33]Petition for Rehearing, Etc. (R. 132, at 137-39).

tent. *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966). The Tenth Circuit Court of Appeals upheld the lower Court's jurisdiction, saying:[34]

> At the outset, the Secretary challenges the jurisdiction of the court because the relief sought seeks to diminish the title of the United States in the lands, consequently it is a necessary party and has not consented to be sued. We agree with the trial court that the decision of the Secretary of the Interior adversely affects Brennan's title to the land in question and is reviewable under the Administrative Procedure Act. 5 U.S.C. § 1009, (now §§ 701-706). Coleman v. United States, 9 Cir., 363 F.2d 191; Adams v. Witmer, 9 Cir., 271 F.2d 29; Denison v. Udall, D.C. Ariz., 248 F. Supp. 942; Stewart v. Penney [*sic*], D.C. Nev., 238 F. Supp. 821. *Cf.* Homovich v. Chapman, D.C. Cir. 191 F.2d 761.

Jurisdiction Under the Mandamus Statute 28 U.S.C. § 1361

Since 1962 District Courts have been granted original jurisdiction in any action in the nature of mandamus against an officer or employee of the government. The applicable statute, 28 U.S.C. § 1361, reads:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty

[34] *Brennan v. Udall*, —— F.2d —, —(10th Cir. June 22, 1967). The opinion is not yet reported. Our quotation is taken from the copy of the opinion printed as an appendix to a petition for writ of certiorari (No. 634, Oct. Term, 1967) filed with the Supreme Court seeking review of the Court of Appeals' judgment on the merits.

owed to the plaintiff. [Public Law 87-748, § 1, 76 Stat. 744 (1962).]

The purpose of the statute is to give District Courts jurisdiction to issue orders compelling affirmative action by the agents of the government. Consequently these agents can be ordered to perform their duties and to make decisions, even in matters involving an exercise of discretion. S. Rep. No. 1922, 87th Cong., 2d Sess. (1962). Where the officer of the government has discretion, of course the District Court may not substitute its discretion for that of the officer. *Ibid.*

The mandamus statute is new. Despite this fact there have been numerous decisions by the courts to establish the right of the District Court to exercise jurisdiction under it to grant either supplemental or independent relief under the state's complaint here. In *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966), the Court ruled (and the government conceded) that the statute vested the District Court with jurisdiction to determine whether federal prison rules violated the right of prisoners to exercise their Muslim religion. In *Medoff v. Freeman*, 246 F. Supp. 125 (D. Mass. 1965), *aff'd*, 362 F.2d 472 (1st Cir. 1966), it was held that § 1361 granted jurisdiction for review of a probationary employee's contentions that he was entitled to a letter of charges, a right to reply, and an appeal for administrative reconsideration by the Department of Agriculture. In *Ashe v. McNamara*, 335 F.2d 277 (1st Cir. 1965), the court ruled that § 1361 conferred

jurisdiction on the District Court to compel the Secretary of Defense to reconsider a sentence imposed by a court-martial and to grant appropriate relief "in recognition that the court-martial sentence ordering the plaintiff's dishonorable discharge was invalid." 355 F.2d at 282.

Needless to say, sovereign immunity to suit cannot be asserted to defeat the express jurisdiction granted to District Courts by § 1361.[35] As Professor Byse explains in his article cited in footnote 35, 75 Harv. L. Rev. at 1511:

> The reasoning is that if the grant of jurisdiction would be meaningless or ineffectual unless interpreted as a waiver of immunity, it is proper to conclude that the jurisdictional grant contains an implied consent to be sued. A conscientious federal judge might reasonably conclude that a statute which confers jurisdiction to compel a federal officer to perform his duty is intended to confer an effective jurisdiction, and that therefore the statute contains an implied consent to suit so far as such consent is necessary in order for the court to exercise its jurisdiction to compel performance of the officer's duty.

---

[35]Byse, *Proposed Reforms in "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus,* 75 Harv. L. Rev. 1479, 1511 (1962), states:

> The consent of the United States to be sued sometimes may be inferred from a statutory grant of original jurisdiction to the district courts.

His footnote in support of his statement reads:

> See, *e.g.*, 28 U.S.C. § 1346 (1958); United States v. American Surety Co., 25 F. Supp. 700, 702 (E.D. N.Y. 1938). See also Estrada v. Ahrens, 296 F.2d 690, 698 (5th Cir. 1961); Adams v. Witmer, 271 F.2d 29, 34-35 (1958), *rehearing denied*, 291 F.2d 38 (9th Cir. 1959); Hart & Wechsler, . . . [*The Federal Courts and the Federal System*], at 1140-44.

Damages Under the Tucker Act

The third jurisdictional issue before the Court on this appeal is whether the District Court should have heard and decided the state's claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), for damages to Farm Unit 35. On the merits, this claim raises the same issue that is presented by the state's claim for non-monetary relief against the government's officers, *i.e.*, whether state school lands are "lands held in private ownership" so as to be ineligible for irrigation waters under 43 U.S.C. § 423e. On appeal, however, the only issue is whether there has been a "splitting" of the state's cause of action where the state in the present suit presses only its claim for damages to Farm Unit 35. Stated another way, the question is whether the state may maintain an action for damages to Farm Unit 35 and reserve for another day any damage claims to its remaining twelve parcels (R. 14) of irrigable lands it owns within the South Columbia Basin Irrigation District.

The state contends that it may. *First*, the state has no present cause of action for damages to other school lands within the South Columbia Basin Irrigation District or in the Columbia Basin Project. The state has paid assessments only on Farm Unit 34 and 35, but not on other irrigable lands. (R. 7, 14.) Until assessments are paid on its other lands

the state is not entitled to delivery of water irrespective of acreage restrictions.[36]

Second, even if the state had a cause of action for damages to other parcels of school lands, these causes of action are *separate* causes of action regardless of issues of law common to them and the state's present claim as to Farm Unit 35. Claims involving separate parcels of real property are deemed separate "causes of action" in federal court despite the fact that the claims may involve common issues of law or fact. This issue is well illustrated by the following cases:

I.—*Mendez v. Bowie*, 118 F.2d 435 (1st Cir.), *cert. denied*, 314 U.S. 639 (1941). Prior to the institution of this suit the present defendants brought an action to quiet title to a right of way across real estate known as the Islote property. In that prior suit the Court upheld the present defendants' right of way and enjoined the present plaintiff from interfering with its use. Thereafter, and also prior to the present suit, the present plaintiff instituted a second suit concerning the Islote property. The second suit admitted the right of way but alleged its wrongful use. This second suit was subsequently dismissed on the ground that the extent of the right to use the right of way could have been litigated in the first suit. Because the causes of action were held to be the same in both suits, the first suit was res judicata as

[36]Repayment Contract, as Amended, Between the United States and the South Columbia Basin Irrigation District, art. 30(b).

to all issues in the second suit. The instant suit, the third action between the parties, involved the same right of way deed. However it concerned a different parcel of land, known as the Mercedes property. As to this third suit the Court said, 118 F.2d at 441:

> The defendants maintain that the question of wrongful use [of the right of way] could have been raised in the first suit; that the second suit held that it was impossible, therefore, for the plaintiff to raise the question as to the Islote in the second suit; and that both of these decisions prevent him from raising the same point as to the Mercedes property on the ground that it is the same cause of action. We do not agree. The Mercedes property has never been involved in the prior two suits. It is an entirely different piece of land, and the alleged wrongful use of a right of way over it is a completely different cause of action from an action for such use of a right of way over a different piece of property even though the right of way was given over both properties by the same deed.

II.—*Roberts v. Northern Pac. R.R.*, 158 U.S. 1 (1895). The Northern Pacific acquired certain land by deed from a Wisconsin county. It brought this action in federal court to quiet title to a portion of such lands against the adverse claims by the defendants under a later county deed.

The defendants asserted that the railroad could not relitigate the validity of its conveyance from the county because that question had already been decided against it in a prior state court action involving lands similarly subject to both conveyances. The Supreme Court disagreed, holding that the causes of

action in the two suits were not the same because the lands were not the same. 158 U.S. at 26.

III.—*Ross v. Miller*, 252 U.S. 697 (4th Cir. 1918). This case involved two suits brought in two courts to set aside a release of judgment on the ground of fraud. The judgment creditor brought the first suit in a Virginia state court to enforce his judgment against land in that state. (His action was subsequently removed to federal court.) He brought his second suit, the instant case, in a West Virginia federal court to enforce his judgment against land in West Virginia.

The Circuit Court of Appeals answered the defendants' assertion that the first suit was a bar to the second by saying, 252 Fed. at 700:

> We are also of opinion that the dismissal of plaintiff's bill cannot be sustained by the pendency of a similar suit, previously brought, in the state of Virginia. . . . True, both of them seek to set aside the same release and to enforce the same judgment, but the lands sought to be charged in one case are in Virginia, while in the other the lands sought to be charged are in West Virginia. . . . Such suits have the same parties, to be sure, and are based on the same judgment; but they differ in subject-matter because each is concerned with a separate piece of property.

IV.—*United States v. Pan-American Petroleum Co.*, 55 F.2d 753 (9th Cir.), *cert. denied*, 287 U.S. 612 (1932). This is a famous case arising out of the Teapot Dome scandal. A major issue in the case was whether the United States was entitled to bring a

second suit against Pan-American to set aside oil leases allegedly tainted with the same fraud that had been grounds for setting aside oil leases in a prior suit.

The court prefaced its remarks about the rule against splitting a cause of action by observing, 55 F.2d at 776:

> Care should be taken to distinguish between 'transaction' and 'cause of action.' In the instant case, the evidentiary transaction that has given rise to the government's right to redress is, indeed, identical with the evidentiary transaction that tainted the leases involved in the first Pan-American Case; namely, the Fall-Doheny fraud.

Thereupon the court made an exhaustive review of the authorities which hold that a single "transaction" can give rise to a multitude of "causes of action." See 55 F.2d at 776-82. It followed its review of the authorities by summarizing the law regarding the defense of "split cause of action" and by holding that separate causes of action arose as to each tract of land subjected to a single oil lease. As a consequence, since the first Pan-American case involved different lands and leases, it was no bar to this second action. 55 F.2d at 782.

V.—*Fessenden v. Barrett*, 50 Fed. 690 (D. N.H. 1891). This action was brought to foreclose a mortgage on one of several separate parcels of land subject to the mortgage. The defendant, who claimed ownership under a tax title, sought dismissal of the action on the ground that prior litigation between

the mortgagee and the defendant's predecessor in interest was res judicata as to the matters in controversy. However, since the prior action involved different parcels of land, the court held different causes of action were involved and the first suit merely estopped the mortgagee from relitigating matters and material facts distinctly put in issue in the prior case.

CONCLUSION

For the foregoing reasons, the District Court's order dismissing the state's complaint against the United States and its officers should be reversed with the direction that the state's claims be heard and decided on the merits.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,
HAROLD T. HARTINGER,
J. R. PRITCHARD,
Assistant Attorneys General,
Attorneys for Appellant.

December 1967

APPENDIX A

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 2996

STATE OF WASHINGTON, *Plaintiff*,
v.
STEWART L. UDALL, Secretary of the Interior,
et al., *Defendants*.

ORDER OF DISMISSAL AND FINAL JUDGMENT

THIS CAUSE came on before the Court at Spokane, Washington on May 19, 1967, the Honorable Charles L. Powell presiding, on motion to dismiss, interposed by the defendants Stewart L. Udall, Secretary of the Department of the Interior of the United States of America; Floyd E. Dominy, Commissioner of the United States Bureau of Reclamation; H. T. Nelson, Regional Director of the United States Bureau of Reclamation; W. E. Rawlings, Columbia Basin Project Manager of the United States Bureau of Reclamation; and the United States of America. The Court, having considered the records and files in this action, Memoranda of Authorities submitted by the respective parties, and having heard arguments of counsel; and the Court having

thereupon rendered oral opinion herein, concluding that the motion of the defendants Stewart L. Udall, and others, should be granted;

The Court having further determined pursuant to Rule 54(b), Federal Rules of Civil Procedure, that there is no just reason for delay and having directed the entry of a final judgment herein as to all defendants excepting only the defendant South Columbia Basin Irrigation District, now therefore,

IT IS HEREBY ORDERED AND ADJUDGED that:

The motion to dismiss the Complaint in this action, interposed by the defendants Stewart L. Udall, Floyd E. Dominy, H. T. Nelson, W. E. Rawlings, and the United States of America, is hereby granted and as to said defendants and each of them the complaint of the plaintiff State of Washington is hereby dismissed.

This Order Granting Dismissal herein as to said defendants is based upon the following reasons and grounds:

1. The Court lacks jurisdiction herein for the reason that the United States of America, an indispensable party to this action, has not consented to be sued or otherwise waived its sovereign immunity from actions of the character stated in the complaint of the State of Washington.

2. The Court lacks jurisdiction herein for the reason that the suit as against the defendants, Udall, Secretary of the Department of the Interior of the United States of America; Floyd E. Dominy,

Commissioner of the United States Bureau of Reclamation; H. T. Nelson, Regional Director of the United States Bureau of Reclamation; W. E. Rawlings, Columbia Basin Project Manager of the United States Bureau of Reclamation, is in essence an action against the United States of America, to which it has not consented.

3. This Court lacks jurisdiction of the subject matter of this action for the reason that application of the Tucker Act (28 USCA 1346(a) (2)) to afford relief to the plaintiff in damages, within the limits of the jurisdiction of this court, and as sought by the complaint of the plaintiff, would in effect permit separate litigation by the plaintiff upon a portion of similarly-situated lands of the plaintiffs within the Columbia Basin Reclamation Project, constituting an impermissible splitting of plaintiff's cause of action.

4. This Court lacks jurisdiction to grant the relief sought by the plaintiff, State of Washington, in its complaint.

A transcript of the oral decision of the Court rendered on May 19, 1967, as prepared and certified by the Court Reporter of this Court, and which sets forth the oral statement by the Court of the reasons and grounds for the granting of motion to dismiss, is attached to this Order and by reference is made a part hereof.

DATED this 7 day of July, 1967.

CHARLES L. POWELL

United States District Judge

* * *

ORAL DECISION OF THE COURT

May 19, 1967

* * *

THE COURT: I appreciate your arguments and the able briefs that have been submitted.

I think probably if I took this matter under advisement I would only come to the conclusion that I feel I must make now. If counsel have no objections I would like to dispose of this matter at this time.

I have considered the dilemma of the State and the Irrigation District, and I recognize the frustration that they have in dealing with the government agencies, surrounded by the immunity which the Government has.

I feel that this is a case where the rule of Dugan v. Rank applies. I have some knowledge of that case because I was sitting on the Court of Appeals when the original appeal was heard, when it was California versus Rank, as I remember it, and I concurred with Judge Merrill when he held that the Reclamation officials at that time were acting beyond the scope of their authority, and therefore some of the requested relief was granted.

The Court of Appeals decisions was reversed, and the Supreme Court opinion reiterates the rule in the Larson case, that no relief will be granted against government officials if the relief calls for an expenditure of moneys from the public treasury or requires action by the Government.

I feel that this is a case which comes within the rule of sovereign immunity, and that the motion to dismiss must be granted.

Now, I feel constrained in making that statement to mention two or three of the arguments that Mr. Hartinger has made. First on the application of the Tucker Act, I feel that this is or would be a splitting of causes of action if we should permit the litigation of every farm unit in a separate lawsuit where the same principle of law is involved in every suit. I think he must go to the Court of Claims for his relief and not attempt to limit the suit to $10,000 under the Tucker Act.

Under the Administrative Procedures Act, 5 U.S. Code Annotated, 1001 to 1009, and subsequent sections, review procedures are set out. It is a remedial act as in the new mandamus statute, 28 U S C A, 1361. There is no attempt to create in this court special jurisdiction by the passage of these acts. In my opinion this is an action involving contract, and I believe that the Administrative Procedures Act would not apply.

Further, I do feel that there are administrative remedies that have not been pursued, but I am assuming that if they had been we would arrive at the same point where we are now.

The mandamus statute does not say that officials may be mandamused under any circumstances. It only applies, as I understand it, if there is

a refusal by an official to act as provided by statute, where he is required to take some action.

Now, I mention at this time that I feel there is a definite need for some determination of this question. The Irrigation District is between the State and the Government. It is required to make payments to the Government for irrigation water that has not been used, and the State cannot use the water because it cannot sign a recordable contract, and cannot dispose of the property because it cannot sell it except at public auction to the highest bidder. Such a sale is prevented by the Columbia Basin Project Act.

There is a definite need of Congressional legislation, and I feel that is probably the only place where the remedy may lie.

This Court cannot grant the mandatory injunction as requested against the Government officials who are named in this motion.

* * *

APPENDIX B

Public Law 87-728 [H.R. 11164]
76 Stat. 677-79 (1962)

AN ACT

To approve an amendatory repayment contract negotiated with the Quincy Columbia Basin Irrigation District, authorize similar contracts with any of the Columbia Basin Irrigation Districts, and to amend the Columbia Basin Project Act of 1943 (57 Stat. 14), as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the amendatory repayment contract with the Quincy Columbia Basin Irrigation District negotiated by the Secretary of the Interior, pursuant to subsection (a) of section 7 of the Reclamation Project Act of 1939 (53 Stat. 1192; 43 U.S.C. 485f), which contract was approved by the district electors on February 13, 1962, is hereby approved and the Secretary is hereby authorized to execute it on behalf of the United States and to negotiate and execute on behalf of the United States amendatory repayment contracts in substantially the same form or amendatory repayment contracts containing substantially the same provisions with the South and East Columbia Basin Irrigation Districts.

Sec. 2. Upon any amendatory repayment contract with a Columbia Basin Irrigation District ap-

proved or authorized by this Act becoming effective to bind the United States, that district's share of the operation and maintenance funds expended or obligated for the construction of drainage works including appropriate interest thereon during calendar years 1960, 1961, and 1962 shall be capitalized and charged as a part of the construction cost of the project works assigned directly to irrigation and the Secretary shall either refund to it or give it credit for (as it may elect) all operation and maintenance payments (including interest paid by it in connection therewith) which it has made for the construction of drainage works during those years, such credit, if so elected by the district, to be applied against future development period and/or construction charges of the district as they become due.

Sec. 3. The Columbia Basin project shall be governed by the Federal reclamation laws, being the Act of June 17, 1902 (32 Stat. 388), and all Acts amendatory thereof or supplementary thereto, except that sections 2, 3, 7, and 9 of the Columbia Basin Project Act of March 10, 1943 (57 Stat. 14), as amended, are hereby repealed and section 4 of the Columbia Basin Project Act, as amended, is further amended to read as follows:

"Sec. 4. (a) For the purposes f assisting in the permanent settlement of farm families, protecting project land, and facilitating project development, the Secretary is authorized to administer public lands of the United States in the project area and lands acquired under this section; to sell, ex-

change, or lease such lands; to dedicate portions of such lands for public purposes in keeping with sound project development; to acquire in the name of the United States, at prices satisfactory to him, such lands or interests in lands, within or adjacent to the project area, as he deems appropriate for the protection, development, or improvement of the project; and to accept donations of real and personal property for the purposes of this Act. Any moneys realized on account of donations for purposes of this Act shall be covered into the Treasury as trust funds.

"(b) Contracts, exchanges, and leases made under this section shall be on terms that, in the Secretary's judgment, are in keeping with sound project development. In addition, land sale and exchange contracts shall be on a basis that, in the Secretary's judgment, provides for the return, in a reasonable period of years, of not less than the appraised value of the land and improvements thereon. Qualification of applicants for the purchase of land for irrigation farming shall be prescribed as provided in subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 702), notwithstanding any other provisions of law. No farm unit shall be sold to, and no contract to sell a farm unit shall be entered into with, any person, corporation, or joint-stock association which has theretofore purchased or entered into a contract to purchase a farm unit from the United States on the Columbia Basin project. The foregoing provisions of this paragraph shall apply only to the sale of farm units which are suitable for settle-

ment purposes. Farm units which, in the opinion of the Secretary, are not suitable for settlement purposes may be sold with a preference to resident project landowners as supplemental units, subject to the applicable irrigable acreage limitations on the delivery of water, but the purchasers thereof shall not be entitled to benefits of the Act of August 13, 1953 (67 Stat. 566) with respect thereto."

Sec. 4. The Secretary is hereby authorized and directed to amend or modify all existing contracts, instruments, rules, regulations, forms, and procedures entered into or issued under the Columbia Basin Project Act, as amended (16 U.S.C., chap. 12D) prior to the date of enactment of this Act to conform to the provisions of this Act.

Sec. 5. (a) Notwithstanding the provisions of the Federal reclamation laws, water may be delivered to a farm unit platted before the enactment of this Act that contains a nominal quarter section of land exceeding one hundred and sixty irrigable acres insofar as those provisions limit the delivery of water to irrigable lands in excess of one hundred and sixty irrigable acres.

(b) The rights of any vendee or grantee as defined in section 3 of the Columbia Basin Project Act of 1943 are hereby preserved as to any transactions that were consummated by contract or deed prior to repeal of said section 3 of this Act.

Sec. 6. The following sections of the Columbia Basin Project Act of March 10, 1943, are hereby amended in the following respects:

(a) Section 5(b). Delete the last sentence thereof.

(b) Section 6. Delete "under section 2 hereof" and insert in lieu thereof the words "for the repayment thereof".

(c) Section 8. Delete "and to include in the contracts hereinbefore provided for" and insert in lieu thereof the words "and to include in contracts relating to the Columbia Basin project".

Sec. 7. The Act of June 23, 1959 (73 Stat. 87) is hereby amended to permit delivery of water to not to exceed six hundred and forty acres of irrigable lands whether or not said lands are in conformed farm units, owned by the State of Washington for use by the Washington State University for agricultural research purposes.

Approved October 1, 1962.

APPENDIX C

43 U.S.C. § 423e

§ 423e. *Completion of new projects or new division; execution of contract with district as condition precedent to delivery of water; contents of contract; cooperation of States with United States; limitations on sale of land*

No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located

whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided however*, That if excess land is acquired by foreclosure or other process of law, by conveyance in

satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment. May 25, 1926, c. 383, § 46, 44 Stat. 649; July 11, 1956, c. 563, § 1, 70 Stat. 524.

APPENDIX D

Public Law 851, 81st Cong., 2d Sess.
64 Stat. 1074 (1950)

AN ACT

To amend the Columbia Basin Project Act with reference to State lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second paragraph of section 7 of the Columbia Basin Project Act (Act of March 10, 1943, ch. 14, 57 Stat. 14) be amended to read as follows:

"Legislation otherwise conforming to the standards above stated in this section will meet the requirements of the section even though, by reason of limitations in the State constitution, the contracts required under subsection 2(c) cannot be executed pursuant to such legislation as to the State's school and other public lands. As to such lands the provisions and requirements of subsection 2(c) shall remain effective, except that the purchaser of such State lands, his heirs and devisees, if otherwise qualified to execute a recordable contract, shall not be disqualified to execute such contract by reason of the amount of the purchase price paid or to be paid to the State for such lands; but the period in which the required recordable contracts may be executed shall

be extended: (a) as to any of such lands remaining in the ownership of the State, until six months after the removal of the constitutional limitations above referred to; and (b) as to any of such lands which are offered for sale by the State in accordance with such program for the offering of State lands within the project as may be agreed to between the State and the Secretary, until six months after the State's conveyance or contract to convey is made, whichever is earlier."

Approved September 27, 1950.

APPENDIX E

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Columbia Basin Project, Washington

Agreement Relating to Disposal of State Lands in the Columbia Basin Project, Washington

THIS AGREEMENT, made this 12th day of September, 1951, pursuant to the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, including the Columbia Basin Project Act (57 Stat. 14) as amended by Public Law 851, 81st Congress, and the pertinent portion of Section 2 of the Act of August 30, 1935 (49 Stat. 1028, 1039), collectively referred to as the Federal Reclamation Laws, and Sections 89.12.010 through 89.12.130, inclusive, Revised Code of Washington between THE UNITED STATES OF AMERICA, hereinafter called the United States, acting through the Regional Director, Region 1, Bureau of Reclamation, hereinafter called the Regional Director, and the STATE OF WASHINGTON, hereinafter called the State, acting through the Commissioner of Public Lands, pursuant to Sections 79.12.300 through 79-.12.370, inclusive, Revised Code of Washington;

WITNESSETH, THAT:

2. WHEREAS, the Commissioner of Public Lands has jurisdiction over State-owned lands in the Columbia Basin Project, hereinafter called the Project, which he desires to have divided into farm units and to dispose of as hereinafter provided; and

3. WHEREAS, the disposal of State lands should be conducted in accordance with a program mutually agreeable to the State and the Regional Director for and on behalf of the Secretary of the Interior;

NOW THEREFORE, it is agreed as follows:

4. The State will permit the United States to enter upon State lands within the Project, and to make surveys thereof, and to include such lands in farm unit plats.

5. The United States, acting in accordance with the provisions of the Columbia Basin Project Act, will plat State lands within the Project into entire farm units whenever practicable and will furnish the State with a print of all preliminary and final farm unit plats which affect State lands promptly upon completion thereof. During the period of preparation of farm unit plats, the United States will inform the State regarding proposed treatment of State lands and will consult and cooperate with the State concerning problems involving State lands which arise during the platting thereof. The United States will not include more than 160 acres of State lands in any one farm unit.

6. The United States will inform the State in writing concerning the legal descriptions, land classifications and appraised values of farm units or portions thereof laid out in final farm unit plats on State lands, and the estimated dates when water will be available to irrigation blocks containing State lands, and will keep the State informed concerning any changes in the program of the United States which will affect water availability dates. All State lands included in farm units will, so far as possible, be reappraised by the United States in accordance with the basis of valuation established under the Columbia Basin Project Act at least one year and not more than two years prior to the estimated dates when water will become available to the irrigation blocks containing such lands.

7. The State will offer its lands in each irrigation block for sale not more than one year prior to the estimated date when water will become available to the particular irrigation block in which the lands are located; and it will announce at the sale thereof the reappraised values placed upon its lands therein by the United States; and it will require, as a condition to the confirmation of its sales, that purchasers enter into recordable contracts with the United States in the form attached hereto as Exhibit A.

8. All sales by the State of land within the Project which has been platted into farm units by the United States will be by farm units as determined by final farm unit plats, where the entire

area of a unit is owned by the State. Where the State does not own all the land in an established farm unit, its sale will comprise all of the State's land within that farm unit. Not more than one farm unit will be sold to any one purchaser. At the time State farm units or portions thereof are offered for sale, the State will notify the United States of proposed sales, in order to enable the latter to bid if it so desires. Where State lands subject to this agreement are, for some special reason, to be sold prior to the filing of final farm unit plats, a thirty-day notice of such proposed sale will be given the United States.

9. Any notice required or authorized by this agreement shall be deemed properly given, except as otherwise specifically provided in this agreement, if mailed, postage prepaid, to the District Manager, Columbia River District, Ephrata, Washington, on behalf of the United States, and to the Commissioner of Public Lands, State of Washington, Olympia, Washington, on behalf of the State.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom.

11. The parties hereto recognize that the Board of State Land Commissioners has general supervision and control over the sale of lands granted to the State for educational purposes and it is not intended that this agreement shall encroach on the jurisdiction of that Board.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed the day and year first above written.

THE UNITED STATES OF AMERICA
By (sgd.) F. M. Clinton

Acting Regional Director, Region 1, pursuant to authorization approved by the Secretary of the Interior on July 25, 1951

STATE OF WASHINGTON
By (sgd.) Jack Taylor

Commissioner of Public Lands

(SEAL)

9-11-51

Approved as to form:
(sgd) E. P. Donnelly
Assistant Attorney General

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD T. HARTINGER
Assistant Attorney General
Of Attorneys for Appellant